

DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 97-0139
Withholding, Food and Beverage, Retail Sales Taxes
For the Years 1996 and 1997

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ISSUE

I. Withholding, Retail Sales, Food and Beverage Tax Assessments Made Against Taxpayers As Responsible Officers.

Authority: IC 6-2.5-2-1(a, b); IC 6-2.5-6-1(a); IC 6-2.5-9-3; IC 6-3-4-8(g); IC 6-8.1-5-1(b); IC 6-9-12-7; Indiana Dept. of Revenue v. Safayan, 654 N.E.2d 270 (Ind. 1995).

Taxpayers protest the assessment of retail sales, food and beverage, and withholding taxes as responsible corporate officers.

STATEMENT OF FACTS

Taxpayers were determined to be responsible officers of a failed restaurant business and, as a result, were assessed individual liability for unpaid food and beverage, retail sales, and withholding taxes for the years 1996 and 1997 due from the restaurant business. The taxpayers filed a protest of that assessment on March 3, 1997 in which the taxpayers, while admitting that they were designated corporate officers at the time of the restaurant's existence, denied having the ability to direct or control the day-to-day business operations. In addition, the taxpayers denied ever having the ability to pay the taxes due from the restaurant business. Rather, the taxpayers maintained that the restaurant was managed entirely by the corporation's original president who purportedly had sole responsibility for the corporation's bank accounts and was the only corporate officer who ever had the authority to issue checks on behalf of the corporation.

The business tax application filed with the state on October 28, 1990 listed the taxpayers as vice-president and as secretary-treasurer of the restaurant corporation. The business tax application indicated that the restaurant was incorporated on April 4, 1990. The business tax application was signed by one of the taxpayers then serving in his capacity as corporate "secretary."

The corporate tax returns for the years ending 1992 and 1994 both list one of the taxpayers – serving as secretary-treasurer – as owning 25% of the corporation's shares.

During 1996 and 1997, one of the two taxpayers – then serving as the corporate vice-president – regularly signed and filed with the Department Indiana sales and use tax returns (Form ST-103A).

A document filed with the bankruptcy court on February 14, 1997, indicated that the two taxpayers, designated therein as two of the restaurant's "current directors," met on January 6, 1997. At that meeting, the two taxpayers – acting unilaterally – voted to remove the original president of the corporation and to substitute one of the two taxpayers, previously designated as vice-president, as successor president of the corporation. A second document filed with the bankruptcy court on May 1, 1997, indicated the taxpayer continued to serve as the successor president. A third document filed with the bankruptcy court, and dated June 30, 1997, indicated that the taxpayer continued to serve as successor president as of that date.

Both taxpayers have filed affidavits purporting to delineate the extent of their relationship with the corporation. The affidavit filed by the first taxpayer – originally designated as the vice-president and later as successor president – asserted that she did not actively participate in the restaurant's business operations, did not perform any functions as an officer or director of the corporation, and had no access to the book or records of the restaurant. Rather, prior to the filing for bankruptcy relief early in 1996, the original president exercised day-to-day control over the corporate business, retained possession and control over all corporate records, and designated those persons who were directly responsible for corporate financial and tax matter. The taxpayer indicates that, subsequent to filing for bankruptcy relief, the bankruptcy examiner was in sole control of the day-to-day operations of the restaurant business but admits that the taxpayer had the authority to perform certain managerial functions and to issue checks in payment of the normal business expenses.

In his affidavit, the second taxpayer, originally designated as corporate secretary-treasurer, maintains that the corporation was controlled by the original president until the time the bankruptcy examiner assumed exclusive responsibility. The taxpayer indicated that he was never privy to the corporation's financial records nor did the taxpayer ever sign or issue corporate checks. Allegedly, the previous president signed all checks, prepared all financial records, represented to the other directors that all taxes had been paid, made all personnel decisions, and was entirely responsible for decisions relating to the initial decision to file for bankruptcy relief. Taxpayer asserts that either the original president or the bankruptcy examiner were, at all relevant times, in absolute control of the corporation's books, records, and business operations.

DISCUSSION

I. Withholding, Retail Sales, Food and Beverage Tax Assessments Made Against Taxpayers As Responsible Officers.

The taxes at issue include food and beverage, retail sales, and withholding taxes as against the taxpayers individually.

Withholding taxes may be assessed against a responsible officer under the provisions of IC 6-3-4-8(g) which states that, "[I]n the case of a corporate or partnership employer, every officer, employee, or member of such employer, who, as such officer, employee, or member is under a

duty to deduct and remit such taxes shall be personally liable for such taxes, penalties, and interest.”

Similarly, an individual may be held personally liable for unpaid sales taxes. IC 6-2.5 et seq. describes the manner in which the retail sales tax is assessed, imposed, and collected.

An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana. The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. *The retail merchant shall collect the tax as agent for the state.* IC 6-2.5-2-1(a, b) (*Emphasis added*).

Each person liable for collecting the state gross retail or use tax shall file a return for each calendar month and pay the state gross retail and use taxes that the person collects during that month . . . IC 6-2.5-6-1(a).

An individual who: (1) is an individual retail merchant or is an employee, officer, or member of a corporate or partnership retail merchant; and (2) has a duty to remit state gross retail or use taxes to the department; holds those taxes in trust for the state and *is personally liable for the payment of those taxes*, plus any penalties and interest attributable to those taxes, to the state. IC 6-2.5-9-3 (*Emphasis added*).

A responsible officer may also be assessed for the payment of unremitted food and beverage taxes. Under IC 6-9-12-7, “The county food and beverage tax shall be imposed, paid, and collected in the same manner that the state gross retail tax is imposed, paid, and collected under IC 6-2.5.” Accordingly, assessing “responsible officers” for the payment of county food and beverage taxes is authorized under IC 6-2.5-6-1(a) by means of the mandate provided in IC 6-9-12-7.

Pursuant to Indiana Dept. of Revenue v. Safayan, 654 N.E.2d 270, 273 (Ind. 1995), three factors are relevant in determining if the taxpayer is a corporate officer who had the authority and responsibility for the payment of taxes held in trust for the state. The court will look to the person’s authority within the power structure of the corporation. Where that person is a high-ranking corporate officer within the corporate power structure, that officer is presumed to have had control over the company’s finances sufficient to give rise to a duty to remit trust taxes. The presumption may be rebutted by a showing the officer did not in fact have that authority.

Second, the court will look to the authority of the officer as established by the articles of incorporation, bylaws, or employment contract.

Third, the court will consider whether the person actually exercised control over the finances of the business including whether the person controlled the corporate bank account, signed corporate check and tax returns, or determined when and in what order to pay creditors.

Both taxpayers occupied – as vice-president, secretary-treasurer, and later as president – positions of considerable responsibility within the corporate structure. As persons occupying those positions, the presumption is that they had “sufficient control over the company’s finances to give rise to a duty to remit the trust taxes.” Safayan, 654 N.E.2d at 273. The presumption is

especially strong “where the person was both a high ranking officer and a member of the board of directors, and a major shareholder in a closely held corporation.” Id.

Both taxpayers were members of the restaurant corporation’s board of directors. Both taxpayers were corporate officers. The taxpayer who served as secretary-treasurer was also a major shareholder of the corporation.

Taxpayers maintain that they both were removed from the day-to-day operations of the corporation and depended on the original taxpayer and the bankruptcy examiner to assure that the corporation’s tax liabilities were met. However, as the court explained in Safayan, “[a] party may be liable for trust taxes without having exclusive control over the corporation’s funds.” Id. at 274. Although if, as the taxpayers’ maintain, they delegated total corporate responsibility to first the original president and then to the bankruptcy examiner, neither of them at any time relinquished their corporate offices or their positions within the corporation. To the contrary, the evidence indicates that both taxpayers maintained control over the corporation’s affairs, during the period in which the corporation had sought bankruptcy relief, sufficient to remove the original president and to substitute the taxpayer – originally designated as the vice-president – in his place.

Taxpayers’ argument that they were unwitting bystanders to the corporation’s day-to-day activities is not entirely borne out by the facts. The information before the Department indicates that the taxpayer, then serving as vice-president, signed and submitted the corporation’s monthly sales and use tax returns. The second taxpayer, in his capacity as secretary-treasurer, signed and submitted the corporation’s business tax application.

However, even accepting the taxpayers’ averments at face value, the taxpayers’ positions as corporate directors and officers of the corporation are sufficient to impute to them the responsibility and liability for the unpaid state taxes. Safayan, 654 N.E.2d at 274. Taxpayers, having taken unto themselves the privileges and advantages conferred by the corporate structure and the responsibilities and liabilities as officers of the corporation, cannot then escape the consequences which then flow as a result of those same decisions by simply asserting that they knew nothing of daily corporate operations.

Taxpayers have failed to meet the burden established under IC 6-8.1-5-1(b) which states that, [t]he notice of proposed assessment is prima facie evidence that the department’s claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong *rests with the person against whom the proposed assessment is made.*” (*Emphasis added*).

FINDING

Taxpayers’ protest is respectfully denied.